

Gerald L. McMahon, Esq. (SBN 036050)
 Elizabeth Smith-Chavez, Esq. (SBN 082900)
 Kirsten Y. Zittlau, Esq. (SBN 220809)
 SELTZER CAPLAN McMAHON VITEK
 A Law Corporation
 750 B Street, 2100 Symphony Towers
 San Diego, California 92101-8177
 Telephone: (619) 685-3139
 Facsimile: (619) 702-6809

Attorneys for Plaintiff
 CHUBB CUSTOM INSURANCE COMPANY

**UNITED STATES DISTRICT COURT FOR
 THE SOUTHERN DISTRICT OF CALIFORNIA**

CHUBB CUSTOM INSURANCE	)	CASE NO. 08-CV1074 BTM (CAB)
COMPANY, a Delaware corporation)	
	)	PLAINTIFF'S MEMORANDUM OF
Plaintiff,	)	POINTS AND AUTHORITIES IN
	)	OPPOSITION TO MOTION TO
vs.	)	DISMISS BASED ON PRIOR PENDING
	)	STATE COURT ACTION
THE ALLEN EARLEY 1998 FAMILY)	
TRUST, a California trust, ALLEN EARLEY	)	Date: September 5, 2008
PLANTERS PROJECT, LP, a California	)	Time: 11:00 a.m.
Limited Partnership, and DOES 1 through 10,	)	Courtroom: 15
inclusive,	)	Hon. Barry Ted Moskowitz
Defendants.)	
)	
)	

Plaintiff CHUBB CUSTOM INSURANCE COMPANY ("Chubb Custom") submits the following opposition to the Motion to Dismiss Based on Prior Pending State Court Action filed by defendants The Allen Earley 1998 Family Trust ("Trust") and Allen Earley Planters Project, LP ("Partnership") (collectively "Defendants"):

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1 **I. INTRODUCTION AND FACTUAL BACKGROUND**

2 This action arises from a property insurance policy issued by Chubb Custom to
3 Defendants effective August 1, 2006, insuring a largely vacant hotel in Brawley, California,
4 known as the Planters' Hotel. (Complaint, ¶ 7.) The policy was conditioned expressly on
5 Defendants maintaining the Hotel's sprinkler system in good working order.
6 (Complaint, ¶ 11.) On March 7, 2007, a fire destroyed the Hotel. (Complaint, ¶ 9.)
7 An investigation showed that the sprinkler system had been turned off before the fire and that
8 the system lacked water. (Complaint, ¶ 17.)

9 Chubb Custom filed this action on June 17, 2008, seeking a determination that it had no
10 liability under the policy because of the failure of the express condition that the fire
11 suppression system be maintained in good working order. Defendants are the only two
12 insureds under the policy.

13 Defendants base this motion on the fact that one of them filed a lawsuit in state court a
14 few days before this action was filed. That action was filed on June 11, 2008, by only one of
15 the insureds, the Trust, as well as by a non-insured, P. Allen Earley individually. (Defendants'
16 Request for Judicial Notice, Exh. 1.) The state court action names two additional defendants,
17 Smith-Kandal Insurance Agency and Kuiper Insurance Agency, Inc., Mr. Earley's insurance
18 brokers. (*Id.*)

19 A number of facts critical to this motion were not mentioned in Defendants' moving
20 papers. First, as stated above, the "prior pending" state court action which forms the basis for
21 Defendants' motion was filed only a few days before this action. Chubb Custom did not learn
22 about the state court action until **after** this federal action had been filed and served.
23 See Declaration of Elizabeth Smith-Chavez in Opposition to Motion to Dismiss
24 ("Smith-Chavez Dec."), ¶ 3. Furthermore, Defendants did not disclose to Chubb Custom that
25 the state court action had been filed until **after** Defendants had served numerous third-party
26 subpoenas, apparently hoping to obtain this discovery before Chubb Custom found out that it
27 had been sued. (Smith-Chavez Dec., ¶ 5.)

Also important to a determination of this motion is the fact that the state court action was brought by only one of the Defendants here, but both Defendants here are insureds under the insurance policy at issue.¹

II. SUMMARY OF ARGUMENT

Defendants raise a number of arguments on this motion, all asserting that this case should be dismissed because of the existence of the state court action. All of these arguments are based on the fact that one of the Defendants filed the state court action a few days before this lawsuit was filed. This is not sufficient for this Court to engage in the extraordinary act of abstaining from asserting jurisdiction over this case, either by a stay or by dismissal.

III. ARGUMENT

A. The Anti-Injunction Act Does Not Apply.

Chubb Custom has not asked that this Court issue an injunction with regard to the state court action², and thus the Anti-Injunction Act cited by Defendants is simply not applicable. The sole case cited by Defendants involved a federal lawsuit filed against a state court judge requesting that the federal court overrule a decision of that judge. (*Owens-Corning Fiberglas Corporation v. Moran* (7th Cir. 1992) 959 F.2d 634.) Under no stretch of the imagination is that case applicable to this action in which Chubb Custom seeks no relief relating to the state court or the lawsuit filed therein.

¹ Defendants recognized this issue, asserting that they “can easily amend” their state action to add the other insured, the Partnership as a plaintiff, but the fact remains that they did not do so until after they filed this motion. This late filing cannot support any claim that the Partnership’s complaint was prior to this action or that it has any possible “priority.”

² Chubb Custom has filed a Demurrer with the Imperial County Superior Court and likely will be filing a motion to change venue or otherwise dismiss that action. None of those motions is before this Court on this motion.

1 **B. The Principles of “Comity” Do Not Support Dismissal of This Action.**

2 Defendants argue vaguely that “comity” should require the Court to dismiss this action.
3 Even Defendants admit that its cases are “not precisely on point.” In actuality, principles of
4 comity have no application here, and are irrelevant to this motion.

5 The cases cited by Defendants simply do not support their position. The sole issue in
6 *Milwaukee County v. M.E. White Co.* (1935) 296 U.S. 268 was whether a federal court could
7 refuse to enforce a state judgment on the ground that the judgment was for unpaid state taxes.
8 (*Id.* at 270.) The United States Supreme Court held that the judgment was entitled to full faith
9 and credit. The issue of abstention because of pending state litigation was not even discussed.
10 In *Middlesex County Ethics Committee v. Garden State Bar Ass’n* (1982) 457 U.S. 423,
11 a federal lawsuit was filed specifically to enjoin state attorney disciplinary proceedings on the
12 grounds that those proceedings were unconstitutional. Once again, the case did not deal with
13 the issue of separate state and federal civil actions wherein no party sought to enjoin the
14 actions of the other court, and there was no issue of staying an action in deference to an earlier
15 filed state court action, the proposition for which Defendants purport to cite the case.
16 Finally, the plaintiff in *Champion International Corp. v. Brown* (9th Cir. 1984) 731 F.2d 1406,
17 sought an injunction relating to an order of the Montana Human Rights Commission; the Ninth
18 Circuit found that the District Court abused its discretion in abstaining from the case, noting
19 that “federal courts have an unflagging obligation to exercise their jurisdiction” and that
20 abstention “is a narrow and extraordinary exception” to this duty. (*Id.* at 1408.) The court
21 found that *Younger v. Harris* (1971) 401 U.S. 37 abstention is improper where there is no
22 important state issue. (*Champion International Corp., supra*, at 1408.) In the present case, no
23 injunction or interference with any state proceedings is sought. These cases are simply not
24 applicable; dismissal or abstention is not justified by the principles of “comity” or by any
25 authority cited by Defendants.

1 **C. California's "Prior Pending Rule" Is Not Applicable and Does Not Support**
 2 **Dismissal of This Action.**

3 In making this argument, Defendants rely on California Code of Civil Procedure
 4 § 430.10(c), which has no application to the jurisdiction of this Court either directly or "by
 5 analogy." Furthermore, this section specifically requires that the actions be "between the same
 6 parties." This action and the state action are not between the same parties – the state court
 7 action has three additional parties and the action before this Court includes both insureds while
 8 the state court action did not include both until after this motion was filed.

9 **D. There Is No Federal "First to File" Rule Applicable to This Case.**

10 Recognizing that the cited provisions of California law do not support their request,
 11 Defendants then assert that there is a federal "first to file" rule. There is no such rule, and the
 12 absence of one of the insureds in the state court action when this action and this motion were
 13 filed means that there is no "first filed" action with regard to the Partnership.

14 The cases cited by Defendants do not support a claim that the Court should dismiss this
 15 action because a lawsuit was filed in state court a few days before this lawsuit. In *Globespan,*
 16 *Inc. v. O'Neill* (C.D.Cal. 2001) 151 F.Supp.2d 1229, 1232-33, two federal diversity cases were
 17 consolidated, and the issue was which state's law should be applied. *Alltrade, Inc. v. Uniweld*
 18 *Products, Inc.* (9th Cir. 1991) 946 F.2d 622, also concerned two federal cases, one before the
 19 Central District of California and one an appeal from a decision of the Trademark Trial and
 20 Appeal Board. Even in that inapplicable context, the Court noted that "a basic requirement for
 21 applying the first-to-file rule [is] that the issues in the two suits be identical." (*Id.* at 625.)
 22 In the present case, the state court action and the present action include different parties and
 23 different claims.

24 An understanding of the chronology of events is helpful in analyzing this argument.
 25 This is not a case in which Defendants (or either of them) filed and served a state court action,
 26 and then with knowledge of that action, Chubb Custom later filed this federal lawsuit.
 27 The pertinent events occurred in the following order:

- 28 • The state court action was filed on June 11, 2008.
- The federal action was filed June 17, 2008.

1 • The federal action was served on the Partnership on June 19, 2008 with the summons
2 and complaint mailed on June 20, 2008.

3 • The federal action was served on the Trust on June 23, 2008, with the summons and
4 complaint mailed on June 24, 2008.

5 • The state court complaint was delivered (albeit not properly served) to an entity
6 related to Chubb Custom on June 24, 2008.³

7 **E. Dismissal of This Case Is Not Appropriate Under the *Colorado River* Doctrine.**

8 The final argument made by Defendants is that abstention is proper under *Colorado*
9 *River Water Conservation District v. United States* (1976) 424 U.S. 800 (referred to herein
10 as "*Colorado River*".)

11 **1. The *Colorado River* Doctrine.**

12 The *Colorado River* doctrine derives its name from an opinion in which the
13 United States Supreme Court did the following three things (among others):

14 First, the Court discussed the "abstention doctrine", finding it to be "an extraordinary
15 and narrow exception" permitting a district court "only in exceptional circumstances" to
16 "abdicate[e]" its "obligation to decide cases." (*Id.* at 813-14.)

17 Second, the Court discussed the limited categories of cases to which abstention is
18 applicable:

19 Our decisions have confined the circumstances appropriate for abstention to three
20 general categories.

21 (a) Abstention is appropriate in cases presenting a federal constitutional issue
22 which might be mooted or presented in a different posture by a state court
determination of pertinent state law...

23 (b) Abstention is also appropriate where there have been presented difficult
24 questions of state law bearing on policy problems of substantial public import
whose importance transcends the result in the case then at bar...

27 ³ Smith-Chavez Dec., ¶¶ 2-3; Declaration of Antonio Ramirez, Jr., in Opposition to Motion to
28 Dismiss, ¶¶ 1-2.

(c) Finally, abstention is appropriate where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings ...⁴

Third, the Court held that, in certain situations *even more extraordinary* than the “exceptional” and “extraordinary” situations in which abstention might be justified, principles of wise judicial administration might sometimes justify an abstention-like result. In so holding, the Court took great care to emphasize “the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them,” and to further emphasize that a federal court should not deviate from that obligation and surrender its jurisdiction absent truly “exceptional” circumstances. The court specifically noted “Generally, as between state and federal courts, the rule is that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.” (*Id.* at 817.) *See also, Moses H. Cone Memorial Hospital v. Mercury Construction Corp* (1983) 460 U.S. 1, 15-16 (*Colorado River* doctrine applicable only in “exceptional circumstances;” reversing stay); *Holder v. Holder* (9th Cir. 2002), 305 F.3d 854, 867 (reversing stay).

2. The Colorado River Doctrine Does Not Apply.

The *Colorado River* doctrine does not apply in the circumstances presented here. Defendants list a number of factors re *Colorado River* abstention, none of which support an abstention stay, much less dismissal.⁵

“The substantial similarity of the state and federal actions.” Although the two lawsuits are related to the same insurance policy, they involve different parties and different claims. Where the cases involve different causes of action, abstention is not proper.

⁴ *Id.* at 814-817 (citations and quotation marks omitted). The three categories of abstention discussed in the *Colorado River* opinion typically are called *Pullman* abstention, *Burford* abstention, and *Younger* abstention, respectively. None of them applies in the present case.

⁵ This is a motion to dismiss, yet many of the cases cited by defendants relate only to stays of proceedings, not dismissals. See Defendants’ discussion regarding *Colorado River* abstention at pages 5 et seq. of its moving points and authorities.

(See, e.g., *Bethlehem Contracting Co. v. Lehrer/McGovern, Inc.* (2nd Cir. 1986) 800 F.2d 325, 328.)

"The order in which the courts assumed jurisdiction over the parties." These cases were filed within a few days of each other. Indeed, it is undisputable that Chubb Custom served its complaint **before** Defendants even told Chubb Custom that the state court lawsuit had been filed, and certainly before it had been served. Thus, to the extent that this factor is relevant, it militates against abstention. Furthermore, to the extent that this factor would consider the filing dates, the difference was only a few days. Chubb Custom filed this action without knowing of the state court action, precisely because Defendants chose to conceal that action for a perceived tactical advantage. Such gamesmanship should not entitle Defendants to any procedural advantage and cannot support this motion.

Furthermore, as is noted in a case cited by Defendants, the mere fact that one lawsuit was filed first is not determinative. "The state complaint preceded the federal complaint, but it is not determinative or abstention would spawn a race to the courthouse." (*Woodford v. Community Action Agency of Greene County, Inc.* (2nd Cir. 2001) 239 F.3d 517, 521.) Defendants' argument (that it has priority because it filed its lawsuit a few days before the federal complaint) was specifically rejected in *Perez v. Mitsubishi Motors Corp.* (D. Puerto Rico 1991) 758 F. Supp 100, 101 (rejecting a claim to priority because the lawsuit was filed a "mere weekend" earlier).⁶ This factor does not support this motion.

"The relative inconvenience of the fora." There can be no doubt that this court, in a metropolitan area near freeways and a long-distance airport, is more convenient for the large number of party-related and third-party witnesses, who would otherwise have to travel to

⁶ Cf. *Evanston Ins. Co. v. Jimco, Inc.* (5th Cir. 1988) 844 F.2d 1185, 1191. ("The order of obtaining jurisdiction does not speak for abstention. Although the federal court suit was filed after the state courts had acquired jurisdiction, very little had occurred in any of the parallel state proceedings with regard to the claims against Evanston... [T]he existence of previously initiated state proceedings is merely one factor among many for the court to consider." Citations omitted.)

1 El Centro. (Smith-Chavez Dec., ¶ 5.) Furthermore, all counsel are located in San Diego,
 2 including Defendants' own attorney. One of the Defendants has its principal (and probably
 3 only) place of business in San Diego.⁷ "Where the federal court is just as convenient as the
 4 state court, that factor favors retention of the case in federal court." (*Woodford v. Community*
 5 *Action Agency of Greene County, Inc.*, *supra*, at 523.) As numerous cases have held, the fact
 6 that the federal court forum and state court forum are equally convenient is a factor that weighs
 7 *against* application of the *Colorado River* doctrine.

8 [T]he inconvenience factor primarily involves the physical proximity of the
 9 federal forum to the evidence and witnesses... [T]he question is not whether the
 10 federal forum is inconvenient, but rather whether there is any contention that the
 federal forum was any less convenient to the parties than the state forum.⁸

11 "The relative progress of the two actions." The two actions were filed within days of
 12 each other, so this is not a factor. To date there have been no substantive decisions in or by
 13 either court. Defendants may argue that the subpoenas served in the state court action
 14 constitute "progress" of that case. This argument must be rejected for two reasons. First,
 15 Defendants did not disclose those subpoenas to Chubb Custom, apparently hoping to gain an
 16 advantage by such non-disclosure; they should not be rewarded for such behavior. (It is
 17 telling, however, that nearly all of the subpoenas were served on parties outside of Imperial
 18 County, including parties in San Diego County, thus establishing the inconvenience of the
 19 Imperial County forum. (Smith-Chavez Dec., ¶ 5.) Second, Defendants should not be allowed
 20 to benefit from actions taken by them after the filing of this motion. Third, because of Federal
 21 Rule of Civil Procedure 26, discovery is not allowed in the federal case until the Initial

23 ⁷ Defendants inaccurately claim that they are "domiciled in Imperial County." (Moving Points
 24 and Authorities, 1:26.) According to the records of the California Secretary of State,
 25 the Partnership's office is located at 725 South Coast Highway 101, Encinitas, in San Diego
 County. (Smith-Chavez Dec., ¶ 4.)

26 ⁸ *Evanston Ins. Co.*, *supra*, at 1191 (emphasis in original). *Accord*, *Travelers Indemnity*
 27 *Company v. Madonna* (9th Cir. 1990) 914 F.2d 1364, 1368 (reversing stay); *Murphy v. Uncle*
 28 *Ben's, Inc.* (5th Cir. 1999) 168 F.3d 734, 737 (same).

Disclosures; Chubb Custom should not be penalized for complying with the rules. The bottom line is that neither case has progressed substantially. This factor is neutral, and therefore supports the retention of jurisdiction.

"The desire to avoid piecemeal litigation." Because the two lawsuits include different causes of action and parties, this factor weighs against abstention. Furthermore, "there must be some 'exceptional basis' for deferring to a state proceeding where a court is concerned with the avoidance of piecemeal litigation." (*Perez v. Mitsubishi Motors Corp.*, *supra*, at 102.) No such exceptional basis exists. As the United States Supreme Court stated in *Colorado River* "... the rule is that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction." (*Colorado River*, *supra*, at 817-18.) As with other cases arising in this circuit:

This case involves ordinary contract and tort issues and is thus unlike *Colorado River* where important real property rights were at stake and where there was a substantial danger of inconsistent judgments. Here there is no "vastly more comprehensive" state action that can adjudicate the rights of many parties or the disposition of much property.⁹

* * *

Because this case does not involve jurisdiction over a res or property ... there is no danger of inconsistent rulings affecting property ownership. Therefore, the avoidance of piecemeal litigation does not weigh in favor of abstention. Insofar as the Louisiana businesses have filed counterclaims against Evanston, this will result in only duplicative, not piecemeal, litigation. The prevention of duplicative litigation is not a factor to be considered in an abstention determination.¹⁰

"Whether federal law or state law provides the rule of decision on the merits." It is generally the case that diversity actions present state law questions, but that is not in itself

⁹ *Travelers Indemnity Company*, *supra*, at 1369 (reversing stay).

¹⁰ *Evanston Ins. Co.*, *supra*, at 1192 (reversing dismissal). *Accord*, *Kelly Investment, Inc. v. Continental Common Corp.* (5th Cir. 2003) 315 F.3d 494, 498-499 (reversing stay of action removed to federal court).

1 sufficient grounds for abstention. (*Perez v. Mitsubishi Motors Corp.*, *supra*, at 102
 2 [...The mere fact that the outcome of the case is governed by state law does not warrant
 3 dismissal – to hold otherwise would undermine the purpose and reach of federal diversity
 4 jurisdiction... It is generally agreed that rare circumstances exist only when a case
 5 contemplates novel or complex questions of state law.”]) This case presents no novel questions
 6 of state law more appropriate for the state court. The absence of a federal-law issue does not
 7 counsel in favor of abstention, for as the [Supreme] Court [has] stated ... , “our task ... is not to
 8 find some substantial reason for the exercise of federal jurisdiction.” The presence of a federal
 9 law issue “must always be a major consideration weighing against surrender [of jurisdiction],”
 10 but the presence of state law issues weighs in favor of surrender only in rare circumstances.
 11 This case does not involve rare circumstances under which the presence of controlling issues of
 12 [state] law might make abstention appropriate.¹¹

13 “Whether the state court will adequately protect the rights of all the parties.”
 14 When this case was filed, and when the state court case was filed, it was clear that the state
 15 court case could not protect all the rights of the parties because one of the insureds, whose
 16 presence was necessary to a determination of rights under the Policy, was absent from the state
 17 court case. It was only after this motion was filed, and after Chubb Custom filed a demurrer in
 18 the state court action, that Defendants belatedly amended the state court complaint to add the
 19 missing insured. (Smith-Chavez Dec., ¶ 6.) If that were sufficient to trigger the extraordinary
 20 act of abstention, a defendant could always defeat a diversity federal lawsuit, by filing its own
 21

22 ¹¹ *Evanston Ins. Co.*, *supra*, at 1193 (citations omitted). *Accord*, *Travelers Indemnity*
 23 *Company*, *supra*, at 1370 (“[Movant] argues that ‘the presence of state law issues supports
 24 abstention’ where there are also other factors favoring abstention. Its argument does not
 25 correctly state the law: although ‘the presence of federal-law issues must always be a major
 26 consideration weighing against surrender,’ the ‘presence of state-law issues may weigh in
 27 favor of that surrender’ only ‘in some rare circumstances.’ Since this case involves routine
 28 issues of state law – misrepresentation, breach of fiduciary duty, and breach of contract –
 which the district court is fully capable of deciding, there are no such ‘rare circumstances’
 here;” reversing stay; quoting in part *Moses H. Cone Memorial Hosp.*, *supra*, at 26).

1 state court action as a reactive tactic. That is simply not the law. Indeed "...the possibility that
 2 the state court proceeding might adequately protect the interests of the parties is not enough to
 3 justify the district court's deference to the state action." (*Bethlehem Contracting Co. v.*
 4 *Lehrer/McGovern, Inc.*, *supra*, at 328.) Ninth Circuit jurisprudence establishes that the
 5 *Colorado River* doctrine does not apply in situations in which it cannot be said with confidence
 6 that the state court action will conclusively resolve the matters at issue in the federal court
 7 action.¹²

8 In its opinion in *Intel Corp. v. Advanced Micro Devices* (9th Cir. 1993) 12 F.3d 908,
 9 913, the Ninth Circuit concluded that the absence of "full confidence" that the parallel state
 10 proceeding would completely resolve the matters in issue in the federal court proceeding
 11 sufficed, by itself, to preclude dismissal or stay.

12 Since we find that there exists a substantial doubt as to whether the state court
 13 proceedings will resolve all of the disputed issues in this case, it is unnecessary
 14 for us to weigh the other factors included in the *Colorado River* analysis."¹³

15 "Whether the federal filing was vexatious (intended to harass the other party) or
 16 reactive (in response.)" This factor militates against abstention; Chubb Custom could not have
 17 "reacted" to a lawsuit of which it had no knowledge and which Defendants intentionally
 18 concealed for a perceived tactical advantage.

19 "The risk of conflicting results." Because the causes of action are different, there is no
 20 risk. This factor supports denying this motion. Defendants rely on *American Int'l*

21
 22 ¹² *Smith v. Central Ariz. Water Conservation Dist.* (9th Cir. 2005) 418 F.3d 1028, 1033
 23 (affirming denial of motion for *Colorado River* dismissal or stay; quotation marks and citations
 24 omitted). *Accord Intel Corp.*, *supra*, at 913 ("a district court may enter a *Colorado River* stay
 25 order only if it has full confidence that the parallel state proceeding will end the litigation;"
 reversing stay order; quotation marks and citations omitted); *Gulfstream Aerospace Corp. v.*
Maya Camas Corp. (1988) 485 U.S. 271, 277 (affirming denial of stay).

26 ¹³ *Intel Corp.*, *supra*, at 913, n.7 (reversing stay order; citing *40235 Washington Street Corp. v.*
 27 *Lusardi* (9th Cir. 1992) 976 F.2d 587, 589 as another Ninth Circuit case "declining to weigh
 28 other factors when one is sufficient to bar stay"). *Accord Smith*, *supra*, at 1033-1034.

1 *Underwriters v. Continental Ins. Co.* (9th Cir. 1988) 843 F.2d 1253, but fail to note that the
 2 Ninth Circuit in that case reversed an order granting an abstention motion, despite the district
 3 court's finding that the actions were "parallel."

4 "That there are two parallel actions pending." The mere existence of a related state
 5 court action is not sufficient to trigger abstention. "There is no bar against parallel *in*
 6 *personam* actions proceeding in two or more courts. 'Each court is free to proceed in its own
 7 way and in its own time, without reference to the proceedings in the other court.'" (*Woodford*
 8 *v. Community Action Agency of Greene County, Inc.*, *supra*, at 525; see also, *Fox v. Maulding*
 9 (10th Cir. 1994) 16 F.3d 1079, 1082.)

10 All factors must be considered in doing a *Colorado River* analysis. Wherever a factor is
 11 neutral, that is ground to deny a motion for abstention, not a factor to be ignored.
 12 (*Woodford v. Community Action Agency of Greene County, Inc.*, *supra*, at 522 ["Thus, the
 13 facial neutrality of a factor is a basis for retaining jurisdiction, not for yielding it."])
 14 Defendants omit a number of other factors relevant to *Colorado River* abstention, presumably
 15 because they weigh against abstention. For example, an important factor is whether either court
 16 has taken control over any property or res. (*Woodford v. Community Action Agency of Greene*
 17 *County, Inc.*, *supra*, at 523. See, e.g., *American Home Assur. Co. v. Roxco, Ltd.* (S.D. Miss.
 18 1999) 81 F.Supp.2d 674, 679-680 ("since this case does not involve any res or property over
 19 which any court, state or federal, has taken control, the first *Colorado River* factor weighs
 20 against abstention;" denying motion to dismiss or stay; citations and quotation marks omitted).

21 **3. Even a Stay Under the *Colorado River* Doctrine Would Not Be Warranted.**

22 Finally, the circumstances presented here no more warrant a stay than they do dismissal.
 23 In this regard it is appropriate to review some of the Ninth Circuit jurisprudence emphasizing
 24 the extent of the doctrine's bias *against* entry of a stay. These opinions state that:

25 Any doubt as to whether a factor exists should be resolved against a stay, not in
 26 favor of one...

* * *

We emphasize that our task in cases such as this is not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist “exceptional” circumstances, the “clearest of justifications,” that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction.

To determine whether a stay is warranted, the relevant factors must be balanced, “with the balance heavily weighted in favor of the exercise of jurisdiction.”¹⁴

Similarly:

Colorado River does *not* say that every time it is possible for a state court to obviate the need for federal review by deciding factual issues in a particular way, the federal court should abstain. As the Supreme Court has observed, such a holding would “make a mockery of the rule that only exceptional circumstances justify a federal court’s refusal to decide a case in deference to the States.”¹⁵

So powerful are these admonitions that “the mere potential for conflict in the results of adjudications, does not, without more, warrant staying exercise of federal jurisdiction,”¹⁶ and one factor alone can be sufficient to prevent surrender of a federal court’s jurisdiction.¹⁷

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¹⁴ *Travelers Indemnity Company v. Madonna*, *supra*, at 1369, 1371-1372 (reversing stay; quoting in part *Moses H. Cone Memorial Hospital*, *supra*, at 16, 25-26; emphasis in original *Moses H. Cone* opinion). *Accord Holder*, *supra*, at 871-872 (reversing stay).

¹⁵ *United States v. Morros* (9th Cir. 2001) 268 F.3d 695, 706 (emphasis in original; reversing dismissal; quoting in part *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans* (1989) 491 U.S. 350, 368).

¹⁶ *Colorado River*, *supra*, at 816 (citations and quotation marks omitted).

¹⁷ *Intel Corp.*, *supra*, at 913 n.7 (“Since we find that there exists a substantial doubt as to whether the state court proceedings will resolve all of the disputed issues in this case, it is unnecessary for us to weigh the other factors included in the *Colorado River* analysis;” reversing stay; citing *40235 Washington Street Corp.*, *supra*, at 589 as another Ninth Circuit case “declining to weigh other factors when one is sufficient to bar stay”).

1 **IV. CONCLUSION**

2 No basis exists to dismiss this action. The authority and arguments presented by
3 Defendants do not support the granting of this motion. Chubb Custom respectfully submits
4 that this Motion to Dismiss should be denied.

5 Dated: August 22, 2008

6 SELTZER CAPLAN MCMAHON VITEK
A Law Corporation

7
8 By: /s/ Elizabeth Smith-Chavez

9 Gerald L. McMahon, Esq.

Elizabeth Smith-Chavez, Esq.

10 Kirsten Y. Zittlau, Esq.

11 Attorneys for Plaintiff CHUBB CUSTOM
INSURANCE COMPANY
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Gerald L. McMahon, Esq. (SBN 036050)
 Elizabeth Smith-Chavez, Esq. (SBN 082900)
 Kirsten Y. Zittlau, Esq. (SBN 220809)
 SELTZER CAPLAN McMAHON VITEK
 A Law Corporation
 750 B Street, 2100 Symphony Towers
 San Diego, California 92101-8177
 Telephone: (619) 685-3139
 Facsimile: (619) 702-6809

Attorneys for Plaintiff
 CHUBB CUSTOM INSURANCE COMPANY

**UNITED STATES DISTRICT COURT FOR
 THE SOUTHERN DISTRICT OF CALIFORNIA**

CHUBB CUSTOM INSURANCE
 COMPANY, a Delaware corporation

Plaintiff,

vs.

THE ALLEN EARLEY 1998 FAMILY
 TRUST, a California trust, ALLEN EARLEY
 PLANTERS PROJECT, LP, a California
 Limited Partnership, and DOES 1 through 10,
 inclusive,
 Defendants.

) CASE NO. 08-CV1074 BTM (CAB)

)
) **DECLARATION OF ANTONIO**
) **RAMIREZ, JR., IN OPPOSITION TO**
) **MOTION TO DISMISS BASED ON**
) **PRIOR PENDING STATE COURT**
) **ACTION**

)
) Date: September 5, 2008
) Time: 11:00 a.m.
) Courtroom: 15
) Hon. Barry Ted Moskowitz

I, ANTONIO RAMIREZ, JR., declare:

1. I am an employee of Chubb Insurance, located at 555 Flower Street, Los Angeles California. This is not the business office for Chubb Custom Insurance Company.

2. On June 24, 2008, a copy of the summons and complaint in a lawsuit filed with the Imperial County Superior Court, entitled The Allen Earley 1998 Family Trust and P. Allen Earley vs. Chubb Custom Insurance Company, a Delaware Corporation, Smith-Kandal

1 Insurance Agency, Inc, Kuiper Insurance Agency, Inc., a California Corporation and Does 1
2 through 100, inclusive, was left with the receptionist at the offices at 555 Flower Street, Los
3 Angeles, California.

4 I declare under penalty of perjury under the laws of the United States that the foregoing
5 is true and correct and within my personal knowledge.

6 Executed on August 19, 2008, at San Diego, California.

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10 ANTONIO RAMIREZ, JR.
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Gerald L. McMahon, Esq. (SBN 036050)
 Elizabeth Smith-Chavez, Esq. (SBN 082900)
 Kirsten Y. Zittlau, Esq. (SBN 220809)
 SELTZER CAPLAN McMAHON VITEK
 A Law Corporation
 750 B Street, 2100 Symphony Towers
 San Diego, California 92101-8177
 Telephone: (619) 685-3139
 Facsimile: (619) 702-6809

Attorneys for Plaintiff
 CHUBB CUSTOM INSURANCE COMPANY

**UNITED STATES DISTRICT COURT FOR
 THE SOUTHERN DISTRICT OF CALIFORNIA**

CHUBB CUSTOM INSURANCE	)	CASE NO. 08-CV1074 BTM (CAB)
COMPANY, a Delaware corporation)	
	)	DECLARATION OF ELIZABETH
Plaintiff,	)	SMITH-CHAVEZ IN OPPOSITION TO
	)	MOTION TO DISMISS BASED ON
vs.	)	PRIOR PENDING STATE COURT
	)	ACTION
THE ALLEN EARLEY 1998 FAMILY)	
TRUST, a California trust, ALLEN EARLEY	)	Date: September 5, 2008
PLANTERS PROJECT, LP, a California	)	Time: 11:00 a.m.
Limited Partnership, and DOES 1 through 10,	)	Courtroom: 15
inclusive,	)	Hon. Barry Ted Moskowitz
Defendants.)	
)	
)	

I, ELIZABETH SMITH-CHAVEZ, declare:

1. I am an attorney at law and a member of Seltzer Caplan McMahon Vitek, counsel of record for plaintiff CHUBB CUSTOM INSURANCE COMPANY ("Chubb Custom").

2. The summons and complaint in this lawsuit was delivered to defendant The Allen Earley 1998 Family Trust on June 23, 2008, and mailed on June 24, 2008. A true

1 and correct copy of the proof of service is attached as Exhibit A to the Notice of Lodgment in
2 Opposition to Motion to Dismiss Based on Prior Pending State Court Action ("NOL"), filed
3 herewith.

4 3. The summons and complaint in this lawsuit was delivered to defendant Allen
5 Earley Planters Project, LP, on June 19, 2008, and mailed on June 20, 2008. A true and correct
6 copy of the proof of service is attached as Exhibit B to the NOL. Thus, both defendants had
7 received the summons and complaint in this action before the state court complaint was
8 delivered to Chubb Custom.

9 4. Our office searched the records of the California Secretary of State and learned
10 that the address of record for Allen Earley Planters Project, L.P. is 725 South Coast
11 Highway 101, Encinitas, California 92024. A true and correct copy of the printout from the
12 California Secretary of State website is attached as Exhibit C to the NOL.

13 5. On June 24, 2008, I spoke with counsel for plaintiffs, Ralph Peters. This was
14 after the complaint and summons in this action had been served on both defendants. I told him
15 that I had heard that there were some subpoenas which had been served in the state court
16 action. He told me that there were "5 or 6" subpoenas. He would not tell me to whom they
17 were addressed. When I asked if there was anything else going on, he told me that there was
18 nothing that he could divulge. I later learned that there were at least 13 subpoenas which had
19 been served on third party witnesses. Nearly all of them were dated June 16, 2008, which we
20 learned after we were finally able to obtain a copy of them on June 27, 2008. Other than
21 subpoenas served on the City of Brawley, all of these subpoenas were served on persons and
22 entities outside of the County of Imperial. Most of the known witnesses are outside of
23 Imperial County; for all of these witnesses to travel to San Diego, near freeways and with a
24 long distance airport, would be much more convenient.

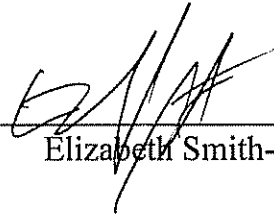
25 6. The original state court complaint did not include the Allen Earley Planters
26 Project, LP, as a plaintiff, despite the fact that the insurance policy shows that this entity is a
27 named insured on the insurance policy at issue. On July 30, 2008, an Amendment to the
28 Complaint in the state court action, adding the Allen Earley Planters Project, LP, as a plaintiff

1 in the state court action, was served on Chubb Custom by mail. This was after the federal
2 action had been filed, after our firm had filed a demurrer on this basis with the Imperial County
3 Superior Court, and after this motion had been filed. A true and correct copy of this
4 amendment is attached as Exhibit D to the NOL. (Although this amendment is dated
5 July 17, 2008, it was not mailed to us until July 30, 2008. The state court demurrer was filed
6 on July 24, 2008, and is set for hearing on August 25, 2008, on the remaining issues on the
7 demurrer.)

8 I declare under penalty of perjury under the laws of the United States that the foregoing
9 is true and correct and within my personal knowledge.

10 Executed on August 22, 2008, at San Diego, California.

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Elizabeth Smith-Chavez, Esq.

Gerald L. McMahon, Esq. (SBN 036050)
Elizabeth Smith-Chavez, Esq. (SBN 082900)
Kirsten Y. Zittlau, Esq. (SBN 220809)
SELTZER CAPLAN McMAHON VITEK
A Law Corporation
750 B Street, 2100 Symphony Towers
San Diego, California 92101-8177
Telephone: (619) 685-3139
Facsimile: (619) 702-6809

Attorneys for Plaintiff
CHUBB CUSTOM INSURANCE COMPANY

**UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA**

CHUBB CUSTOM INSURANCE
COMPANY, a Delaware corporation

Plaintiff,

YS.

THE ALLEN EARLEY 1998 FAMILY TRUST, a California trust, ALLEN EARLEY PLANTERS PROJECT, LP, a California Limited Partnership, and DOES 1 through 10, inclusive.

Defendants.

CASE NO. 08-CV1074 BTM (CAB)

**NOTICE OF LODGMENT IN
OPPOSITION TO MOTION TO
DISMISS BASED ON PRIOR PENDING
STATE COURT ACTION**

Date: September 5, 2008

Time: 11:00 a.m.

Courtroom: 15

Hon. Barry Ted Moskowitz

Plaintiff CHUBB CUSTOM INSURANCE COMPANY, (“Chubb Custom”) hereby lodges the following exhibits in support of its opposition to motion to dismiss based on prior pending state court action.

EXHIBIT	DESCRIPTION
A	Proof of service for the summons and complaint served on the defendant The Allen Earley 1998 Family Trust on June 24, 2008.

EXHIBIT	DESCRIPTION
B	Proof of service for the summons and complaint served on defendant Allen Earley Planters Project, L.P., on June 20, 2008.
C	Printout from the California Secretary of State website regarding Allen Earley Planters Project, L.P.
D	Amendment to the Complaint in the state court action, served July 30, 2008.

Dated: August 22, 2008

SELTZER CAPLAN MCMAHON VITEK
A Law Corporation

By: /s/ Elizabeth Smith-Chavez
Gerald L. McMahon, Esq.
Elizabeth Smith-Chavez, Esq.
Kirsten Y. Zittlau, Esq.
Attorneys for Plaintiff CHUBB CUSTOM
INSURANCE COMPANY

EXHIBIT “A”

PAUL WHITE SBN: 146989
 TRESSLER, SODERSTROM, MALONEY & PRIESS, LLP
 1901 AVENUE OF THE STARS, #450
 LOS ANGELES, CA 90067
 (310) 203-4800

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA

CHUBB
 v.
 THE ALLEN EARLEY

Plaintiff(s)
 Defendant(s)

CASE NUMBER:
 08CV1074BTMCAB

PROOF OF SERVICE
 SUMMONS AND COMPLAINT
 (Use separate proof of service for each person/party served)

1. At the time of service I was at least 18 years of age and not a party to this action and served copies of the (specify documents):
 - a. ☒ summons ☒ complaint ☐ alias summons ☐ first amended complaint
 - ☐ second amended complaint
 - ☐ third amended complaint
 - ☒ other (specify): Civil Cover Sheet; Certificate & Notice of Interested Parties
2. Person served:
 - a. ☒ Defendant (name:) THE ALLEN EARLEY 1998 FAMILY TRUST
 - b. ☒ Other (specify name and title or relationship to the party/business named):
 RANDY DOE, 44, 5'9, CAUC, M - PERSON IN CHARGE
 - c. ☒ Address where the papers were served: 690 W. MAIN STREET
 EL CENTRO, CA 92243
3. Manner of Service in compliance with (the appropriate box must be checked):
 - a. ☒ Federal Rules of Civil Procedure
 - b. ☐ California Code of Civil Procedure
4. I served the person named in Item 2:
 - a. ☐ By Personal Service. By personally delivering copies. If the person is a minor, by leaving copies with a parent, guardian, conservator or similar fiduciary and to the minor if at least twelve (12) years of age.
 1. ☐ Papers were served on (date): at (time):
 - b. ☒ By Substituted Service. By leaving copies:
 1. ☐ (home) at the dwelling house, usual place of abode, or usual place of business of the person served in the presence of a competent member of the household, at least 18 years of age, who was informed of the general nature of the papers.
 2. ☒ (business) or a person apparently in charge of the office, or place of business, at least 18 years of age, who was informed of the general nature of the papers.
 3. ☒ Papers were served on (date): 06/23/2008 at (time): 03:20 pm
 4. ☒ by mailing (by first-class mail, postage prepaid) copies to the person served in Item 2(b) at the place where the copies were left in Item 2(c).
 5. ☒ papers were mailed on (date): 06/24/2008
 6. ☐ due diligence. I made at least three (3) attempts to personally serve the defendant

PROOF OF SERVICE - SUMMONS AND COMPLAINT

- c. ☐ **Mail and acknowledgment of service.** By mailing (*by first-class mail or airmail, postage prepaid*) copies to the person served, with two (2) copies of the form of Waiver of Service of Summons and Complaint and a return envelope, postage prepaid addressed to the sender. (**Attach completed Waiver of Service of summons and Complaint**).
- d. ☐ **Service on domestic corporation, unincorporated association (including partnership), or public entity.** (F.R.Civ.P. 4(h)) (C.C.P. 416.10) By delivering, during usual business hours, a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute and the statute so requires, by also mailing, by first-class mail, postage prepaid, a copy to the defendant.
- e. ☐ **Substituted service on domestic corporation, unincorporated association (including partnership), or public entity.** (C.C.P. 415.20 only) By leaving during usual business hours, a copy of the summons and complaint in the office of the person served with the person who apparently was in charge and thereafter by mailing (*by first-class mail, postage prepaid*) copies of the persons at the place where the copies were left in full compliance with C.C.P. 415.20 Substitute service upon the California Secretary of State requires a court order. (**Attach a copy of the order to this Proof of Service.**)
- f. ☐ **Service on a foreign corporation.** In any manner prescribed for individuals by FRCP 4(f)
- g. ☐ **Certified or registered mail service.** By mailing to an address outside California (*by first-class mail, postage prepaid, requiring a return receipt*) copies to the person served. (**Attach signed return receipt or other evidence of actual receipt by the person served**).
- h. ☐ **Other** (specify code section and type of service):

5. Service upon the United States, and Its Agencies, Corporations or Officers.

- a. ☐ by delivering a copy of the summons and complaint to the clerical employee designated by the U.S. Attorney authorized to accept service, pursuant to the procedures for the Office of the U.S. Attorney for acceptance of service, or by sending a copy of the summons and complaint by registered or certified mail addressed to the civil process clerk at the U.S. Attorneys Office

Name of person served:

Title of person served:

Date and time of service: (date): at (time):

- b. ☐ By sending a copy of the summons and complaint by registered or certified mail to the Attorney General of the United States at Washington, D C. (**Attach signed return receipt or other evidence of actual receipt by the person served**).
- c. ☐ By sending a copy of the summons and complaint by registered or certified mail to the officer, agency or corporation (**Attach signed return receipt or other evidence of actual receipt by the person served**).

6. At the time of service I was at least 18 years of age and not a party to this action.

7. Person serving (*name, address and telephone number*):

Jesus Israel Flores
Janney & Janney Attorney Service, Inc.
1545 Wilshire Blvd., Ste. 311
Los Angeles, CA 90017
(213) 628-6338

a. Fee for service: \$ 285.00

- b. ☐ Not a registered California process server
- c. ☐ Exempt from registration under B&P 22350(b)
- d. ☒ Registered California process server
Registration #: 2006-0004

8. ☐ I am a California sheriff, marshal, or constable and I certify that the foregoing is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Date: July 9, 2008

Jesus Israel Flores
Type or Print Server's Name


(Signature)

PROOF OF SERVICE - SUMMONS AND COMPLAINT

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address)		FOR COURT USE ONLY
PAUL WHITE TRESSLER, SODERSTROM, MALONEY & PRIESS, LLP 1901 AVENUE OF THE STARS, #450 LOS ANGELES, CA 90067 TELEPHONE NO.: (310) 203-4800 FAX NO.: (310) 203-4850 E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): Plaintiff Chubb Custom Insurance Company		
USDC - SOUTHERN DISTRICT - SAN DIEGO STREET ADDRESS: 880 FRONT STREET MAILING ADDRESS: CITY AND ZIP CODE: SAN DIEGO, CA 92101 BRANCH NAME: SOUTHERN DISTRICT - SAN DIEGO		
PLAINTIFF/PETITIONER: CHUBB DEFENDANT/RESPONDENT: THE ALLEN EARLEY		
NON SERVICE REPORT		
		CASE NUMBER: 08CV1074BTMCAB

I received the within process on June 18, 2008 and that after due and diligent effort I have been unable to personally serve said witness. The following itemization of the dates and times of attempts details the efforts required to effect personal service. Additional costs for diligence are recoverable under CCP §1033.5 (a)(4)(B).

Servee: **THE ALLEN EARLEY 1998 FAMILY TRUST**

Documents: **summons; complaint; Civil Cover Sheet; Certificate & Notice of Interested Parties**

As enumerated below:

06/19/2008 --

2802 WINONA CT
IMPERIAL, CA 92251

UNABLE TO EFFECT SERVICE AT BUSINESS ADDRESS GIVEN. LOCATION IS A RESIDENCE. HOUSE APPEARS VACANT....

Fee for Service: 285.00

County: **Imperial**

Registration No.: **2006-0004**

Janney and Janney Attorney

Service, Inc.

1545 Wilshire Blvd.

Los Angeles, CA 90017

(213) 628-6338

I declare under penalty of perjury under the laws of the State of California that the foregoing information contained in the return of service and statement of service fees is true and correct and that this declaration was executed on **July 9, 2008** at **Los Angeles, California**.

Signature: _____

Jesus Israel Flores

NON SERVICE REPORT

PAUL WHITE
TRESSLER, SODERSTROM, MALONEY & PRIESS, LLP
1901 AVENUE OF THE STARS, #450 LOS ANGELES, CA 90067
TELEPHONE NO: (310) 203-4800 FAX NO: (310) 203-4850
E-MAIL ADDRESS (Optional):
ATTORNEY FOR (Name): Plaintiff Chubb Custom Insurance Company

FOR COURT USE ONLY

SBN: 146989

TELEPHONE NO : (310) 203-4800

FAX NO : (310) 203-4850

E-MAIL ADDRESS (Optional):

ATTORNEY FOR (Name) Plaintiff Chubb Custom Insurance Company

USDC - SOUTHERN DISTRICT - SAN DIEGO

STREET ADDRESS: 880 FRONT STREET

MAILING ADDRESS:

CITY AND ZIP CODE: SAN DIEGO, CA 92101

BRANCH NAME: SOUTHERN DISTRICT - SAN DIEGO

PLAINTIFF/PETITIONER: CHUBB

DEFENDANT/RESPONDENT: **THE ALLEN EARLEY**

PROOF OF SERVICE BY MAIL

CASE NUMBER:

08CV1074BTMCAB

Luz Vargas

Order#: 1255180/GProof5

EXHIBIT “B”

TRESSLER, SODERSTROM, MALONEY & PRIESS, LLP
 1901 AVENUE OF THE STARS, #450
 LOS ANGELES, CA 90067
 (310) 203-4800

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

CHUBB

Plaintiff(s)

CASE NUMBER:
 08CV1074BTMCAB

v.

THE ALLEN EARLEY PLANTERS PROJECT Defendant(s)

PROOF OF SERVICE
 SUMMONS AND COMPLAINT
 (Use separate proof of service for each person/party served)

1. At the time of service I was at least 18 years of age and not a party to this action and I served copies of the (specify documents):

- a. ☐ summons ☐ complaint ☐ alias summons ☐ first amended complaint
☐ second amended complaint
☐ third amended complaint

☒ other (specify): Summons; Complaint; Certificate and Notice of Interested Parties; Civil Cover Sheet

2. Person served:

- a. ☒ Defendant (name): ALLEN EARLEY PLANTERS PROJECT, L.P., A CALIFORNIA LIMITED PARTNERSHIP
 b. ☒ Other (specify name and title or relationship to the party/business named):
 JAMES J. SCHMID, AGENT - BY LEAVING WITH CHENEQUA DANGERFIELD, RECEPTIONIST
 c. ☒ Address where the papers were served: 5993 AVENIDA ENCINAS, #101
 CARLSBAD, CA 92008

3. Manner of Service in compliance with (the appropriate box must be checked):

- a. ☒ Federal Rules of Civil Procedure
 b. ☐ California Code of Civil Procedure

4. I served the person named in Item 2:

- a. ☐ By Personal Service. By personally delivering copies. If the person is a minor, by leaving copies with a parent, guardian, conservator or similar fiduciary and to the minor if at least twelve (12) years of age.
 1. ☐ Papers were served on (date): at (time):
 b. ☒ By Substituted Service. By leaving copies:
 1. ☐ (home) at the dwelling house, usual place of abode, or usual place of business of the person served in the presence of a competent member of the household, at least 18 years of age, who was informed of the general nature of the papers.
 2. ☒ (business) or a person apparently in charge of the office, or place of business, at least 18 years of age, who was informed of the general nature of the papers.
 3. ☒ Papers were served on (date): 06/19/2008 at (time): 04:58 pm
 4. ☒ by mailing (by first-class mail, postage prepaid) copies to the person served in Item 2(b) at the place where the copies were left in Item 2(c).
 5. ☒ papers were mailed on (date): 06/20/2008
 6. ☐ due diligence. I made at least three (3) attempts to personally serve the defendant.

PROOF OF SERVICE - SUMMONS AND COMPLAINT

- c. ☐ **Mail and acknowledgment of service.** By mailing (by first-class mail or airmail, postage prepaid) copies to the person served, with two (2) copies of the form of Waiver of Service of Summons and Complaint and a return envelope, postage prepaid addressed to the sender (Attach completed Waiver of Service of summons and Complaint).
- d. ☐ **Service on domestic corporation, unincorporated association (including partnership), or public entity.** (F.R.Civ.P. 4(h)) (C.C.P. 416.10) By delivering, during usual business hours, a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute and the statute so requires, by also mailing, by first-class mail, postage prepaid, a copy to the defendant.
- e. ☐ **Substituted service on domestic corporation, unincorporated association (including partnership), or public entity.** (C.C.P. 415.20 only) By leaving during usual business hours, a copy of the summons and complaint in the office of the person served with the person who apparently was in charge and thereafter by mailing by first-class mail, postage prepaid copies of the persons at the place where the copies were left in full compliance with C.C.P. 415.20 Substitute service upon the California Secretary of State requires a court order. (Attach a copy of the order to this Proof of Service.)
- f. ☐ **Service on a foreign corporation.** In any manner prescribed for individuals by FRCP 4(f)
- g. ☐ **Certified or registered mail service.** By mailing to an address outside California (by first-class mail, postage prepaid, requiring a return receipt) copies to the person served. (Attach signed return receipt or other evidence of actual receipt by the person served).
- h. ☐ **Other** (specify code section and type of service):

5. Service upon the United States, and Its Agencies, Corporations or Officers.

- a. ☐ by delivering a copy of the summons and complaint to the clerical employee designated by the U.S. Attorney authorized to accept service, pursuant to the procedures for the Office of the U.S. Attorney for acceptance of service, or by sending a copy of the summons and complaint by registered or certified mail addressed to the civil process clerk at the U.S. Attorneys Office.

Name of person served:

Title of person served:

Date and time of service: (date): at (time):

- b. ☐ By sending a copy of the summons and complaint by registered or certified mail to the Attorney General of the United States at Washington, D.C. (Attach signed return receipt or other evidence of actual receipt by the person served).
- c. ☐ By sending a copy of the summons and complaint by registered or certified mail to the officer, agency or corporation (Attach signed return receipt or other evidence of actual receipt by the person served).

6. At the time of service I was at least 18 years of age and not a party to this action.

7. Person serving (name, address and telephone number):

MICHAEL V. TRINH
JANNEY AND JANNEY
4891 PACIFIC HIGHWAY
SAN DIEGO, CA 92110
(619) 231-9811

- a. Fee for service: \$205.00
- b. ☐ Not a registered California process server
- c. ☐ Exempt from registration under B&P 22350(b)
- d. ☒ Registered California process server
Registration # 1429

8. ☐ I am a California sheriff, marshal, or constable and I certify that the foregoing is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Date: June 25, 2008

MICHAEL V. TRINH
Type or Print Server's Name


(Signature)

PROOF OF SERVICE - SUMMONS AND COMPLAINT

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address) TRESSLER, SODERSTROM, MALONEY & PRIESS, LLP 1901 AVENUE OF THE STARS, #450 LOS ANGELES, CA 90067 TELEPHONE NO. (310) 203-4800 FAX NO.: (310) 203-4850 E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): Plaintiff	FOR COURT USE ONLY
USDC - SOUTHERN DISTRICT - SAN DIEGO STREET ADDRESS: 880 FRONT STREET MAILING ADDRESS: CITY AND ZIP CODE: SAN DIEGO, CA 92101 BRANCH NAME: SOUTHERN DISTRICT - SAN DIEGO	
PLAINTIFF/PETITIONER: CHUBB	
DEFENDANT/RESPONDENT: THE ALLEN EARLEY PLANTERS PROJECT	
NON SERVICE REPORT	CASE NUMBER 08CV1074BTMCAB

I received the within process on June 18, 2008 and that after due and diligent effort I have been unable to personally serve said witness. The following itemization of the dates and times of attempts details the efforts required to effect personal service. Additional costs for diligence are recoverable under CCP §1033.5 (a)(4)(B).

Servee: **ALLEN EARLEY PLANTERS PROJECT, L.P., A CALIFORNIA LIMITED PARTNERSHIP**
 Documents: **Summons; Complaint; Certificate and Notice of Interested Parties; Civil Cover Sheet**

As enumerated below:

06/19/2008 -- 11:00 am

725 SOUTH COAST HIGHWAY 101
 ENCINITAS, CA 92024

UNABLE TO EFFECT SERVICE AT BUSINESS ADDRESS. ADDRESS GIVEN IS IN REAR OF BUILDINGS WITH NO SIGN ON DOOR. COMPANY HERE IS CALLED "EYESPOT CORPORATION" AND HAS BEEN HERE 9 MONTHS. LADY HERE HAS NEVER HEARD OF ENTITY COMPANY OR AGENT.

Fee for Service: 205.00



County: **SAN DIEGO**
 Registration No.: **1429**
Janney and Janney Attorney
Service, Inc.
1545 Wilshire Blvd.
Los Angeles, CA 90017
(213) 628-6338

I declare under penalty of perjury under the laws of the State of California that the foregoing information contained in the return of service and statement of service fees is true and correct and that this declaration was executed on **June 27, 2008** at **SAN DIEGO, California**.

Signature: _____

Kenneth Robert Maskil, Jr.

NON SERVICE REPORT

Order#: 1255179/NonServe

EXHIBIT “C”

California Business Portal



DISCLAIMER: The information displayed here is current as of Jul 4, 2008 and is updated weekly. It is not a complete or certified record of the Limited Partnership or Limited Liability Company.

LP/LLC		
ALLEN EARLEY PLANTERS PROJECT, L.P.		
Number: 200522100008	Date Filed: 8/8/2005	Status: active
Address		
725 SOUTH COAST HIGHWAY 101		
ENCINITAS, CA 92024		
Agent for Service of Process		
JAMES J. SCHMID		
725 SOUTH COAST HIGHWAY 101		
ENCINITAS, CA 92024		

Blank fields indicate the information is not contained in the computer file.

If the agent for service of process is a corporation, the address of the agent may be requested by ordering a status report. Fees and instructions for ordering a status report are included on the Business Entities Records Order Form.

EXHIBIT “D”

07/17/2008

DLSUSA/DIVERSIFIED

PAGE1

ENDORSED

JUL 17 2008

SUPERIOR COURT
IMPERIAL COUNTY
JOSE O. GUILLEN, CLERK
BY LYDIA M. ANTUNEZ
DEPUTY

1 Peter C. Ward, Esq. SBN 126459
2 Christopher H. Hagen, Esq. SBN 179529
3 Ralph W. Peters, Esq. SBN 126948
4 **WARD & HAGEN, LLP**
5 440 Stevens Avenue, Suite 350
6 Solana Beach, California 92075
7 Telephone: (858) 847-0505
8 Facsimile: (858) 847-0105

9 Attorneys for PLAINTIFFS THE ALLEN
10 EARLEY 1998 FAMILY TRUST; P. ALLEN
11 EARLEY; and THE ALLEN EARLEY
12 PLANTERS PROJECT, L.P.

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

14 **FOR THE COUNTY OF IMPERIAL**

15 **THE ALLEN EARLEY 1998 FAMILY TRUST**
16 **and P. ALLEN EARLEY,**

17 **Plaintiffs,**

18 **v.**

19 **CIUUBB CUSTOM INSURANCE COMPANY,**
20 **et al.**

21 **Defendants.**

Case No. EUCO4461

AMENDMENT TO COMPLAINT

Hon. Joseph Zimmerman
Department: 9

FILE BY FAX

22 Plaintiffs THE ALLEN EARLEY 1998 FAMILY TRUST and P. ALLEN EARLEY
23 amend their complaint in this action as follows:

- 24 1. In the frontispiece and caption of the Complaint on file herein, at Page 1, lines 7 and
25 11, add the name "THE ALLEN EARLEY PLANTERS PROJECT, L.P." as a plaintiff party.
26 2. Add at page 1, line 24 the name "THE ALLEN EARLEY PLANTERS PROJECT,
27 L.P." to list of plaintiffs.
28 3. Add to the end of paragraph 2 at page 2 the following language: "Further, and at
29 relevant times referenced herein, the Allen Earley Planters Project, L.P. was a Limited
30 Partnership lawfully organized and operating under the laws of the State of California. At
31 relevant times referenced herein the ALLEN EARLEY 1998 FAMILY TRUST was the

 **COPY**

Peter C. Ward, Esq. SBN 126459
Christopher H. Hagen, Esq. SBN 179529
Ralph W. Peters, Esq. SBN 126948

WARD & HAGEN, LLP

440 Stevens Avenue, Suite 350
Solana Beach, California 92075
Telephone: (858) 847-0505
Facsimile: (858) 847-0105

Attorneys for PLAINTIFFS THE ALLEN
EARLEY 1998 FAMILY TRUST; P. ALLEN
EARLEY; and THE ALLEN EARLEY
PLANTERS PROJECT, L.P.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF IMPERIAL

THE ALLEN EARLEY 1998 FAMILY TRUST
and P. ALLEN EARLEY,

Plaintiffs,

v.

CHUBB CUSTOM INSURANCE COMPANY,
et al

Defendants.

Case No. EUCO4461

AMENDMENT TO COMPLAINT

Hon. Joseph Zimmerman
Department: 9

Plaintiffs THE ALLEN EARLEY 1998 FAMILY TRUST and P. ALLEN EARLEY
amend their complaint in this action as follows:

1. In the frontispiece and caption of the Complaint on file herein, at Page 1, lines 7 and 11, add the name "THE ALLEN EARLEY PLANTERS PROJECT, L.P." as a plaintiff party.
2. Add at page 1, line 24 the name "THE ALLEN EARLEY PLANTERS PROJECT, L.P." to list of plaintiffs.
3. Add to the end of paragraph 2 at page 2 the following language: "Further, and at relevant times referenced herein, the Allen Earley Planters Project, L.P. was a Limited Partnership lawfully organized and operating under the laws of the State of California. At relevant times referenced herein, the ALLEN EARLEY 1998 FAMILY TRUST was the General Partner of the Allen Earley Planters Project, L.P. and the beneficial owner of any and

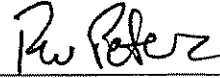
1 all interests in the Planters Hotel held by the Allen Earley Planters Project, L.P.

2 4. At Page 22, lines 19-20, add the name "THE ALLEN EARLEY PLANTERS
3 PROJECT, L.P." as a plaintiff party.

4
5 WARD & HAGEN, LLP

6 Dated: July 17, 2008

7 By:



Peter C. Ward

Ralph W. Peters

Attorneys for Plaintiffs

P. ALLEN EARLEY 1998 FAMILY TRUST,
P. ALLEN EARLEY, and THE ALLEN
10 EARLEY PLANTERS PROJECT, L.P.

1 Earley v Chubb
Superior Court of California - Imperial County
2 Case No EUCO4461

3 **PROOF OF SERVICE**

4 I am employed in the County of San Diego, State of California. I am over the age of eighteen years and not a
party to the within action; my business address is 440 Stevens Avenue, Suite 350, Solana Beach, California 92075.

5 On July 30, 2008, I served the following document(s) described as:

6 **AMENDMENT TO COMPLAINT**

7 on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as
8 follows:

9 Elizabeth Smith-Chavez
Seltzer Caplan McMahon Vitek
10 Symphony Towers
750 B Street
San Diego, CA 92101
11 619.685.3003 [Tel.]
619.685.3100 [Fax]
12 *Attorneys for Plaintiffs*

13 ☒ **BY MAIL:** I am readily familiar with the firm's practice of collection and processing correspondence for
14 mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage
thereon fully prepaid at San Diego, California in the ordinary course of business pursuant to Code of Civil
15 Procedure Section 1013(a). I am aware that on motion of the party served, service is presumed invalid if
postal cancellation date or postage meter date is more than one day after date of deposit for mailing in
16 affidavit.

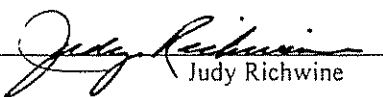
17 ☐ **BY FACSIMILE:** I served said document(s) to be transmitted by facsimile pursuant to Rule 2008 of the
California Rules of Court. The telephone number of the sending facsimile machine was (858) 847-0105.
18 The name(s) and facsimile machine telephone number(s) of the person(s) served are set forth in the service
list. The sending facsimile machine issued a transmission report confirming that the transmission was
19 complete and without error.

20 ☐ **BY PERSONAL SERVICE:** I hand-delivered said document(s) to the addressee(s) pursuant to Code of
Civil Procedure Section 1011.

21 ☐ **BY EXPRESS MAIL:** I caused said document(s) to be deposited in a box or other facility regularly
22 maintained by the express service carrier providing overnight delivery pursuant to Code of Civil Procedure
Section 1013(c).

23 **Executed on July 30, 2008, at San Diego, California.**

24 I declare under penalty of perjury under the laws of the State of California that the foregoing is true and
25 correct.

26 
Judy Richwine

Gerald L. McMahon, Esq. (SBN 036050)
Elizabeth A. Smith-Chavez, Esq. (SBN 082900)
Kirsten Y. Zittlau, Esq. (SBN 220809)
SELTZER CAPLAN McMAHON VITEK
A Law Corporation
750 B Street, 2100 Symphony Towers
San Diego, California 92101-8177
Telephone: (619) 685-3139
Facsimile: (619) 702-6809

Attorneys for Plaintiff
CHUBB CUSTOM INSURANCE COMPANY

**UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA**

CHUBB CUSTOM INSURANCE	)	CASE NO. 08-CV1074 BTM (CAB)
COMPANY, a Delaware corporation)	
)	
Plaintiff,	)	AFFIDAVIT OF SERVICE BY
	)	ELECTRONIC MAIL
vs.)	
)	
THE ALLEN EARLEY 1998 FAMILY)	
TRUST, a California trust; ALLEN EARLEY)	
PLANTERS PROJECT, LP, a California)	
Limited Partnership, and DOES 1 through 10,)	
inclusive,)	
Defendants.)	

I, the undersigned declare under penalty of perjury of the laws of the United States that I am over the age of eighteen years and not a party to this action, that on **August 22, 2008**, I served the following document(s):

1. Plaintiff's Memorandum of Points and Authorities in Opposition to Motion to Dismiss Based on Prior Pending State Court Action.

2. Declaration of Elizabeth Smith-Chavez in Opposition to Motion to Dismiss Based on Prior Pending State Court Action
3. Declaration of Antonio Ramirez, Jr. in Opposition to Motion to Dismiss Based on Prior Pending State Court Action
4. Notice of Lodgment in Opposition to Motion to Dismiss Based on Prior Pending State Court Action.

on the below named person(s) by electronically filing and serving the above-documents in PDF format with the Electronic Case Management System, for each addressee named below:

Peter C. Ward, Esq. Attorneys for Defendants
Christopher H. Hagen, Esq.
Ralph W. Peters, Esq.
Ward & Hagen LLP
440 Stevens Avenue, Suite 350
Solana Beach, California 92075
Email: rpeters@wardhagen.com
Telephone: 858-847-0505
Facsimile: 858-847-0105

Executed on August 22, 2008, at San Diego, California.

/s/ Katherine Young
Katherine Young